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No. 85-895

In The

Supreme Court of the United States

October Term, 1985

RATEPAYERS FIGHT BACK,
Petitioner,

VS.

MIDDLE SOUTH ENERGY, INC.,
ARKANSAS POWER & LIGHT COMPANY,
ARKANSAS PUBLIC SERVICE COMMISSION AND
ATTORNEY GENERAL OF ARKANSAS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT BRIEF IN OPPOSITION ON BEHALF OF MIDDLE SOUTH ENERGY, INC. AND ARKANSAS POWER & LIGHT COMPANY

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QUESTIONS PRESENTED

1. Does the Arkansas Public Service Commission share concurrent jurisdiction with the Securities and Exchange Commission to regulate contracts pertaining to the construction and financing of an interstate wholesale power project and the sale of power therefrom?

2. Can the Federal Energy Regulatory Commission preempt the jurisdiction of the Arkansas Public Service Commission to regulate such contracts?

3. Can the Commerce Clause of the United States Constitution prohibit state regulation of such contracts?

4. Should the courts below have refrained from hearing this case under the abstention doctrine?

5. Did the courts below lack jurisdiction to hear this case by virtue of the "well-pleaded complaint" rule?

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STATEMENT OF THE CASE

In order that the Court may have a proper understanding of the issues involved in this case, petitioner's statement of the case must be supplemented to review briefly the events which culminated in this litigation and which have transpired since the Eighth Circuit entered its decision herein. In the late 1960's, Middle South Utilities, Inc. ("MSU")[1] determined that a need existed in its service area for additional generating capacity. To meet this need, the decision was made to build the Grand Gulf Project, a nuclear generating facility near Port Gibson, Mississippi. To facilitate the financing of the Grand Gulf Project ("Grand Gulf" or the "Project"), MSU created a wholly-owned subsidiary, Middle South Energy, Inc. ("MSE") to own and finance construction of the Project.

In 1974, shortly after its creation, MSE entered into a contract for the sale of Grand Gulf power (the "Availability Agreement") with the operating subsidiaries of MSU, namely Arkansas Power & Light Company ("AP&L"), Louisiana Power & Light Company ("LP&L"), Mississippi Power & Light Company ("MP&L") and New Orleans Public Service, Inc. ("NOPSI"). *Appendix to Brief in Opposition*, Part A. The Availability Agreement was used by MSE, but not by AP&L or the other operating companies, as collateral for a Bank Loan Agreement with various financial institutions. MSE assigned its rights un-

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[1]The following disclosure is made pursuant to Rule 28.1 of the Supreme Court Rules. Arkansas Power & Light Company and Middle South Energy, Inc. are subsidiaries of MSU. Other corporations in the MSU system include, Associated Natural Gas Company, Arklahoma, Electric, Inc., Louisiana Power & Light Company, Mississippi Power & Light Company, New Orleans Public Service, Inc., Middle South Services, Inc. and Systems Fuel, Inc.

der the Availability Agreement to its creditors, with the consent of the operating companies. *Middle South Energy, Inc., et al. v. Arkansas Public Service Commission,* 593 F.Supp. 363, 364-65 (E.D. Ark. 1984). The assignments did not enlarge or otherwise alter the power purchase obligations of the operating companies.

The Arkansas Public Service Commission (the "APSC" or "Commission") was notified of the execution of the Availability Agreement but made no objection thereto. The Availability Agreement, as a transaction between public utilities registered under the Public Utility Holding Company Act of 1935 and not as an issuance of securities as contended by the petitioner, was reviewed by the Securities and Exchange Commission (the "SEC"). The APSC did not participate in that review. *Appendix to Brief in Opposition,* Part B.

The original Availability Agreement did not specify the exact percentages of power to be purchased from the Project by the operating companies. In 1981, the Availability Agreement was amended to allocate specific percentages as follows: AP&L, 17.1%; LP&L, 26.9%; MP&L, 31.3%; and NOPSI, 24.7%. The 1981 amendment also provided that the sale of power from Grand Gulf could be made pursuant to a subsequent power purchase agreement which could provide for an allocation of power on a different basis than that set forth in the Availability Agreement. Later in 1981, a Reallocation Agreement was negotiated which superseded the 1981 amendment to the Availability Agreement and which allocated no power to AP&L, while allocating greater shares thereof to LP&L, MP&L, and NOPSI. *Middle South Energy, Inc. v. Arkansas Public Service Commission, supra,* at p. 365. The Reallocation Agreement was subsequently reviewed by the SEC as an

agreement between public utilities in a proceeding in which the APSC did not participate. *Appendix to Brief in Opposition,* Part B.

Although the Availability Agreement, the 1981 amendment thereto and the Reallocation Agreement addressed the sale of power from Grand Gulf, those agreements were never submitted to the Federal Energy Regulatory Commission (hereinafter "FERC") for its approval because, when they were executed, the commercial operation of Grand Gulf was a number of years away. In 1982, with Unit No. One of the Project nearing completion, MSE filed with the FERC a Unit Power Sales Agreement (the "UPSA"), a rate schedule for the sale of Grand Gulf power. Consistent with the Reallocation Agreement, the UPSA placed no responsibility to purchase power from Grand Gulf on AP&L. The UPSA was assigned to FERC Docket No. ER82-616-000. Because of the relatively high initial costs of Grand Gulf power, parties from Arkansas, Louisiana, Mississippi and Missouri intervened in the FERC proceeding and sought to minimize the amounts of power to be allocated to their respective states. Specifically, the APSC intervened in FERC Docket No. ER82-616-000 to oppose the allocation of *any* Grand Gulf costs to Arkansas. *See generally, Middle South Energy, Inc., et al. v. Arkansas Public Service Commission, et al.*, 772 F.2d 404, 408-9 (8th Cir. 1985).

On February 3, 1984, the presiding Administrative Law Judge in Docket No. ER82-616-000, the Honorable Ernst Liebman, issued an Initial Decision modifying the UPSA by assigning 36% of the costs of Grand Gulf power to AP&L, and by reducing the allocations received by the other operating companies. The various Arkansas parties, including the APSC, appealed the Initial Decision to the

FERC. *Appendix to Memorandum of APSC, Exhibit C,* p. 6.

On March 12, 1984, while appeals of the Initial Decision were pending, the APSC opened two dockets, Nos. 84-040-0II and 84-041-0II, to "investigate" the Grand Gulf Project. *Appendix to Brief in Opposition,* Parts C and D. In Order No. 1 in the latter docket, after stating that the Initial Decision could raise AP&L's rates by $310 million in 1985 alone, the Commission said:

> This investigation, however, will look forward to ascertain what the ratepayers of AP&L, AP&L itself, the Commission, the Governor, and the General Assembly may do to circumvent or deflect the economic harm that looms over the state from the imminent prospect of being mandated by a federal agency to pay for a power generating plant. . . . *Appendix to Brief in Opposition,* Part D.

Meanwhile, the APSC intervened before the SEC in an attempt to block the approval of MSE financing which was necessary to complete the Project. *Id.,* at Part B. Subsequently, on August 1, 1984, following hearings in APSC Docket No. 84-040-0II, the Commission issued a show cause order commanding AP&L to appear and show cause:

> Why all contracts and agreements made by it with respect to any obligations to purchase power from or to pay for construction and operating costs of the Grand Gulf Project should not be held void *ab initio* as a matter of law. Docket No. 84-190-U, Order No. 1 (August 1, 1984). As quoted in *Middle South Energy, Inc., et al. v. Arkansas Public Service Commission, et al,* 593 F.Supp. 363, p. 366.

MSE, a party to certain of these contracts, filed suit on Augsut 31, 1984, to enjoin any further action by the APSC in its show cause proceeding. On September 14,

1984, the District Court enjoined the APSC's efforts to nullify the Grand Gulf contracts as an impermissible infringement upon the exclusive jurisdiction of the FERC. *Id.* A panel of the Eighth Circuit Court of Appeals, on August 23, 1985, upheld the result reached by the District Court but, rather than deciding the question of federal preemption, held that the actions of the APSC violated the Commerce Clause.

In November of 1984, while appeals of Judge Liebman's Initial Decision and the District Court's judgment were still pending, AP&L filed with the APSC an application seeking to recover in its retail rates any Grand Gulf costs which might ultimately be imposed upon it by the FERC. In accordance with state law, the Commission suspended AP&L's application. In 1985, the APSC commenced hearings in the AP&L rate case, one of the issues in which was whether AP&L could recover some or all of its share of the costs of Grand Gulf power. *See generally, Appendix to Memorandum of APSC,* Part C.

On June 13, 1985, the FERC, in Opinion No. 234, approved the allocation of Grand Gulf costs as established in the Initial Decision, effective as of the date when Grand Gulf began commercial operation, July 1, 1985. The APSC had not, however, as of that date approved rates for AP&L which would have allowed it to pass through its retail customers its share of Grand Gulf costs, which amounted to approximately $1 million a day. On August 13, 1985, AP&L filed suit in the District Court in *Arkansas Power & Light Company v. Arkansas Public Service Commission, et al.,* U.S. Dist. Ct., E.D. Ark., Case No. LR-C-85-571, seeking an order compelling the APSC to allow it to recover its Grand Gulf costs in its retail rates. *Appendix to Memorandum of APSC, Exhibit* C, p. 17.

While AP&L's lawsuit was pending, the Eighth Circuit Court of Appeals entered its decision affirming the District Court's decision in the present case. Thereafter, on September 5, 1985, AP&L, the Commission Staff, the Attorney General of Arkansas, the Southern Cotton Ginners Association, Arkansas Electric Energy Consumers and Reynolds Metals Company, representing all the parties to the AP&L rate proceeding, entered into a Stipulation and Settlement Agreement pursuant to which AP&L agreed to absorb some of its Grand Gulf costs and to defer collection of a portion of other such costs, with rates designed to collect the remaining costs to take effect immediately. As part of the Stipulation and Settlement Agreement, the parties thereto agreed to terminate all pending litigation involving the Grand Gulf controversy, except for their appeals of FERC Opinion No. 234. *Appendix to Memorandum of APSC, Exhibit B.*

On September 9, 1985, the APSC issued its Order No. 26 in Docket No. 84-249-U, which approved the Stipulation and Settlement Agreement. Consistent with the settlement, AP&L dismissed its pending federal lawsuit against the APSC and the Commission withdrew its petition for rehearing before the Eighth Circuit in the case at bar. *Id.* at *Exhibit C.* Pursuant to the settlement, AP&L currently has in effect retail rates, approved by the APSC, which allow it to recover a portion of the costs it is presently incurring under FERC Opinion No. 234.

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SUMMARY OF THE ARGUMENT

I. THE DECISION BELOW DOES NOT CONFLICT WITH THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935.

The court below correctly found that the Public Utility Holding Company Act of 1935 did not confer on the states

the power to unduly restrict the wholesale sale of electric power in interstate commerce.

II. THE DECISION BELOW DOES NOT MISCONSTRUE THE FEDERAL POWER ACT.

The Eighth Circuit did not reach the question of state jurisdiction under the Federal Power Act and its opinion does not raise a substantive federal question in regards thereto. The District Court correctly found that the APSC could not interfere with the FERC's jurisdiction over wholesale sales of electric power in interstate commerce.

III. THE DECISION BELOW DOES NOT CONFLICT WITH SUPREME COURT CASES INTERPRETING THE COMMERCE CLAUSE.

The Court of Appeals, based upon a finding that the actions of the APSC represented simple economic protectionism, properly upheld the District Court, consistent with *Bacchus Imports, Ltd. v. Dias*, 468 U.S. —, 104 S.Ct. —, 82 L.Ed.2d 200 (1984) and other decisions of this Court.

IV. THE EXERCISE OF JURISDICTION BY THE COURTS BELOW WAS NOT BARRED BY THE ABSTENTION DOCTRINE.

The lower courts correctly exercised jurisdiction to enjoin *ultra vires* state action which infringed upon the exclusive jurisdiction of the FERC and which unduly restricted interstate commerce.

V. THE EXERCISE OF JURISDICTION BY THE COURTS BELOW WAS NOT BARRED BY THE WELL-PLEADED COMPLAINT RULE.

The well-pleaded complaint rule is inapplicable to the case at bar under *Lawrence County, et al. v. Lead-Deadwood School District*, 469 U.S. —, 83 L.Ed.2d 635, 460 n. 6, 105 S.Ct. — (1985).

VI. THE CASE DOES NOT PRESENT A JUSTICIABLE ISSUE WITHIN THE JURISDICTION OF THE COURT.

In light of the Stipulation and Settlement Agreement among the parties to AP&L's retail rate case, in which the APSC agreed to terminate the show cause proceeding at issue herein, this appeal is moot.

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REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW DOES NOT CONFLICT WITH THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935.

As its first ground for a writ of certiorari, the petitioner postulates a conflict with the decision of the Eighth Circuit, which struck down the APSC's show cause order on Commerce Clause grounds, and the requirements of the Public Utility Holding Company Act of 1935 ("PUHCA"). According to the petitioner, the decision below is inconsistent with the system of concurrent state and federal regulation of public utility securities which has developed under PUHCA.

The petitioner misconstrues the nature of concurrent jurisdiction as defined by the recent decisions of this Court. For example, in *Edgar v. Mite Corporation,* 457 U.S. 624, 102 S.Ct. 2629, 73 L.Ed.2d 269 (1982), the Court held that an Illinois statute regulating corporate takeovers was invalid as a burden on interstate commerce after finding that the concurrent jurisdiction enjoyed by the state of Illinois to regulate securities under the Securities Act of 1933 did not insulate the state from the restrictions placed on it by the Commerce Clause. As the *Edgar* case demonstrates, concurrent jurisdiction simply means that federal regulation in a given area will not invariably preempt

state regulation in that area; it does not mean that the states are free to ignore constitutional limiations on their power.[2] There is no reason to believe that the states' concurrent jurisdiction under PUHCA is any broader than their jurisdiction under the Securities Act for purposes of reviewing state action under the Commerce Clause.

Congress could, of course, grant to the states regulatory authority that the Commerce Clause would otherwise deny them but, with regard to the regulation of utility securities, this was not done. The petitioner attempts to read into PUHCA Sections 1(b) and (c), which decry the evils of unregulated holding companies, a broad grant of power to the states. *See,* 15 U.S.C. §§ 79a (b) - (c). The effort is unsuccessful. These sections are best seen merely as declarations of Congressional policy, not as a deliniation of regulatory authority. *See, United Gas Improvement Company v. Securities and Exchange Commission,* 138 F.2d 1010, 1022 (3rd Cir. 1943) (interpreting 15 U.S.C. § 79a(c)). More importantly, Section 1(a) itself states the Congressional finding that holding companies and public utilities, because their activities extend "over many states are not susceptible to effective control by any state." 15

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[2]The point is well illustrated by the state cases striking down on Commerce Clause grounds state efforts to regulate security issues by multi-state utilities and carriers, despite the obvious presence of concurrent jurisdiction in the absence of undue restrictions on interstate commerce. *See, United Air Lines, Inc. v. Illinois Commerce Commission,* 31 Ill.2d 516, 207 N.E.2d 433 (1965); *United Air Lines, Inc. v. Nebraska State Railway Commission,* 172 Neb. 784, 112 N.W.2d 414 (1961); *State of North Carolina, ex rel Utilities Commission v. Southern Bell Telephone and Telegraph Company,* 288 N.C. 201, 217 N.E.2d 543 (1975); *Panhandle Eastern Pipe Line Company v. Public Utilities Commission of Ohio,* 56 Ohio St. 334, 383 N.E.2d 1163 (1978); *Western Union Telegraph Company v. Michigan Public Service Commission,* 338 N.W.2d 731 (Mich.App. 1983).

U.S.C. § 79a(a). In light of this language, the immediately subsequent Sections 1(b) and (c) cannot reasonably be interpreted as evidence of a Congressional intent to grant to the states unfettered discretion to regulate whatever the state authorities might claim to be a "security."

The petitioner also points to Section 7(g), which provides that an issuer must comply with state law before a declaration to sell securities under PUHCA may become effective, as another source of state authority to regulate interstate security issues without regard to the Commerce Clause. *See*, 15 U.S.C. § 79g(g). This argument incorrectly assumes that the agreements in question are "securities". *See*, 15 U.S.C. § 79b(a)(16). The show cause order itself focuses on the agreements as purchase power contracts; AP&L was ordered to appear and "show cause why all contracts and agreements made by it with respect to any obligations to purchase power from or to pay for construction and operation costs of the Grand Gulf project should not be held to be void *ab initio* as a matter of law." *See, Statement of Case.* At the hearing before the District Court neither the Commission nor the petitioner presented any evidence that the agreements in question were securities.[3] The District Court itself found that:

> The Availability Agreement and amendments thereto are agreements for the purchase of power in interstate commerce or are so integrally related to such purchases that they are subject to the exclusive jurisdiction of the FERC. The other documents which the

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[3]The APSC's order never addressed the question of whether the Grand Gulf contracts were securities under federal law, and as to their status under state law, said only that they "may constitute evidences of indebtedness. . . ." *Appendix to Petition for Certiorari*, A-101.

> APSC seeks to review and regulate are essential to the interstate wholesale of power and therefore are not subject to state jurisdiction. *Middle South Energy, Inc., et al. v. Arkansas Public Service Commission, et al.*, 593 F.Supp. 366.

The petitioner's argument that the subject agreements are "securities" is based not on evidence in the record but largely on the fact that they were filed with the SEC. This argument incorrectly assumes that SEC jurisdiction is limited to the regulation of securities. In fact, SEC jurisdiction under PUHCA extends to a wide range of transactions between affiliated utility companies. For example, Section 13 of PUHCA gives the SEC authority over "any service, sales or construction contract" between affiliated members of a registered public utility holding company. 15 U.S.C. § 79m. Contracts of this type are obviously not securities, but they must be filed with and approved by the SEC. *Compare,* 15 U.S.C. § 79b(a)(16) (defining "security") with 15 U.S.C. § 79(a)(19) (defining "service contract"), 15 U.S.C. § 79b(a)(20) (defining "sales contract") and 15 U.S.C. § 79b(a)(21) (defining "construction contract"). In a similar vein, Section 12 of PUHCA vests the SEC with jurisdiction over various financial dealings between the affiliates of a registered public utility holding company. 15 U.S.C. § 79L.

In arguing that Section 7(g) conferred on the APSC jurisdiction to regulate the Grand Gulf contracts, the petitioner would lead this Court to believe that the Availability Agreement, the amendments to it, *MSE's* assignments of it, and the operating companies' consent to those assignments, were filed with the SEC under Sections 6 and 7 of PUHCA (which regulate security issues) since

only a filing under those provisions would require compliance with state law under Section 7(g). 15 U.S.C. §§ 79f-79g. In reality, the Availability Agreement was filed with and approved by the SEC under Section 12(b), not Sections 6 or 7.

The SEC addressed this precise issue in *Re Middle South Utilities, Inc.*, SEC File Nos. 70-6906, 70-7021 and 70-7026, in which the APSC intervened before the SEC in an effort to block the sale of securities intended to help finance completion of the Project. The APSC argued that the transactions should not be allowed since it had never approved the contracts subject to its show cause order. The APSC argued to the SEC that the indemnity provisions of the Availability Agreement might be an "evidence of indebtedness" under Arkansas law, or, in other words, a security. The SEC expressly refused to decide whether the indemnity provisions could be considered securities.[4] The SEC did, however, find that the availability Agreement had been filed under Section 12(b), which did not confer on the APSC the jurisdiction it was claiming. The SEC also found that MSE's assignments of its rights under the Availability Agreement were not securities. "[T]he assignment of the availability agreement in connection with the bond issuances does not constitute an issuance or sale by APL of a security and therefore does not grant the Arkansas Commission the type of jurisdiction prerequisite to Section 79(g)." The SEC made a similar finding regarding the consents by AP&L to the assignments. In short, the SEC itself has rejected the position now advanced by the petitioner with regard to the

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[4]The SEC found that the indemnity provisions were irrelevant to the proposed stock sale under consideration.

assignments of the Availability Agreement and the consents thereto.

The first question posed by the petitioner—whether PUHCA would permit state regulation otherwise prohibited by the Commerce Clause—is best answered by Section 21, which states that nothing in the act shall "affect" the jurisdiction of any state commission over any security or contract, insofar as the exercise of such jurisdiction does not conflict with the act. 15 U.S.C. § 79u. Section 21 is a "saving" clause intended to protect the states from preemption, but not, as the petitioner argues, to authorize otherwise unconstitutional action. The critical word in Section 21 is "affect," a term Congress would not likely have used to confer additional power on the states. "Affect" can mean "to act upon; influence; change; enlarge or abridge." *Black's Law Dictionary* (Rev. 4th Ed. 1968) p. 79. "Affect" may also mean "to produce an effect upon." *Webster's New Collegiate Dictionary* (1981) p. 19. Given the ordinary usage of the word "affect," Section 21 cannot be seen as a grant of power to the states.

In summary, the conclusion reached by the Eighth Circuit is entirely consistent with this Court's decision in *Edgar v. Mite Corporation, supra,* and the state cases cited in footnote two hereof. No error or conflict with other appellate decisions exists which would justify certiorari herein.[5]

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[5]The one case cited by the petitioner as upholding state regulation, *Indiana & Michigan Power Company v. State of Michigan,* 275 N.W.2d 450 (Mich. 1979), involved intrastate transactions surrounding the construction of an in-state plant and is distinguishable. Note the result reached by the Michigan courts in cases involving multi-state operations, *Great Lakes Transmission Company v. Michigan Public Service Commission,*

(Continued on following page)

II. THE DECISION BELOW DOES NOT MISCONSTRUE THE FEDERAL POWER ACT.

A. The Eighth Circuit Did Not Address The Issue Of Federal Preemption Under The Federal Power Act.

The petitioner's second ground for a writ of certiorari —that the Eighth Circuit wrongly interpreted the Federal Power Act to preempt the APSC's nullification of the Grand Gulf contracts--is wholly without merit, since the court did not even decide that issue. Although the District Court held that the APSC had been preempted, the Eighth Circuit upheld the trial court's injunction on other grounds. On the question of preemption, the Eighth Circuit said that:

> We are not convinced that the district court improperly based its decision on preemption grounds. Nevertheless, *we choose not to address the difficult question of whether the authority denied them under the Federal Power Act may be granted to them by the Holding Company Act.* . . . [Emphasis added.] *Middle South Energy, Inc., et al. v. Arkansas Public Service Commission, et al.*, 722 F.2d 404.

Implicit in Rule 17.1 of the Supreme Court Rules, which addresses the considerations governing review on certiorari, is the assumption that the lower court reached a decision on the question for which review is sought. In view of the Court's customary refusal to decide questions

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180 N.W.2d 59 (Mich. Ct.App. 1970) and *Western Union Telegraph Company v. Michigan Public Service Commission, supra*. Note also that the transactions involved in *Indiana and Michigan Power Company v. Michigan Public Service Commission, supra*, were beyond question securities, while in the present case, it has merely been alleged that the Grand Gulf contracts might be securities. Most importantly, the Michigan Supreme Court did not hold that PUHCA permitted state regulation which would otherwise be unconstitutional.

not addressed by the Courts of Appeals, an issue not determined by the Eighth Circuit should not warrant review on certiorari. *See, United States v. Fleischman*, 339 U.S. 349, 70 S.Ct. 739, 94 L.Ed. 906 (1950); *Owens v. Union Pacific Railroad Company*, 319 U.S. 715, 63 S.Ct. 1271, 87 L.Ed. 1683 (1943). *See also, New York v. Uplinger*, — U.S. —, 104 S.Ct. —, 81 L.Ed.2d 201 (1984) (dismissing writ as improvidently granted where constitutional issue presented was "uncertain"). At the very least, a successful petitioner should be required to show that if the question for which review is sought was not decided by the appeals court, a different result might have been reached had that issue been addressed. Otherwise review becomes a purely academic and irregular exercise, since the "Court does not sit to satisfy a scholarly interest in such issues." *Rice v. Sioux City Memorial Park Cemetery, Inc., et al.*, 349 U.S. 70, 74, 75 S.Ct. 614, 99 L.Ed. 897 (1955).

In the posture of this case, the issue of federal preemption cannot satisfy the test of simple relevance, much less the requirement under Rule 17 that a "special and important" federal question be presented. Not only did the Eighth Circuit not address the question of federal preemption, resolution of that issue was not necessary to affirm the decision of the District Court. Only if this Court were prepared to reverse the Eighth Circuit's holding that the actions of the APSC violated the Commerce Clause, would the question of federal preemption become relevant to the outcome of this case. Standing alone, the issue of preemption does not justify further review in this case.

B. The District Court Correctly Found That The APSC's Show Cause Order Was Preempted By The Federal Power Act.

The petitioner concedes, but dismisses as irrelevant, federal preemption under the Federal Power Act of state

authority over wholesale power sales in interstate commerce. The petitioner also apparently concedes that the effect of the Federal Power Act was "to draw a bright line easily ascertained, between state and federal jurisdiction over" retail and wholesale electric rates. *Federal Power Commission v. Southern California Edison Company, et al.*, (the *Colton* case), 376 U.S. 205, 84 S.Ct. 644, 11 L.Ed 2d 638 (1964). In seeking to overturn the decision of the District Court, the petitioner attempts to defend the APSC's show cause order as an exercise of state jurisdiction over securities, which is usually allowed. *See,* 16 U.S.C. 824(c). *See also, Jersey Central Power & Light Company v. Federal Power Commission,* 319 U.S. 61, 63 S.Ct. 953, 87 L.Ed 1258 (1943).

Despite the characterization given to the APSC's order by the petitioner, both lower courts recognized that this case involves the allocation of the cost of wholesale power sold in interstate commerce, not the intrastate regulation of securities. The Court need not, however, address the complex issue of the precise nature of the Grand Gulf contracts, for even when a state acts in an area in which it generally has jurisdiction, it may not act in a way which frustrates federal regulation.

Although no one would deny that the states retain the jurisdiction to regulate retail rates, few would argue today that such jurisdiction could be used to frustrate an FERC order by refusing to allow a utility to recover in its retail rates FERC-imposed wholesale expenses. *See, Narragansett Electric Company v. Burke,* 119 R.I. 559, 381 A.2d 1358 (1977), certiorari denied 435 U.S. 972[6] Like-

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[6]*See also, People's Counsel of the District of Columbia v. Public Service Commission,* 444 A.2d 975 (D.C. App. 1982); *City of Chicago v. Illinois Commerce Commission,* 13 Ill.2d

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wise, state jurisdiction over generating facilities ought not to be used to disrupt federal regulation of the wholesale power market. *State of Utah v. Federal Energy Regulatory Commission*, 691 F.2d 444 (10th Cir. 1982). And despite the allegations of the petitioner, state jurisdiction over securities cannot be used to frustrate federal regulation. *Natural Gas Pipeline Company of America, et al. v. Illinois Commerce Commission*, 210 N.E.2d 490 (Ill. 1965); *Great Lakes Transmission Company v. Michigan Public Service Commission, supra.*[7] As this Court made clear in *Northern Natural Gas Company v. State Corporation Commission of Kansas*, 372 U.S. 84, 83 S.Ct. 646, 9 L.Ed.2d 601 (1963), which struck down a state order compelling the pro rata taking of natural gas from wells, but which did not attempt to control prices directly, state action which even indirectly interferes with federal regulation is forbidden.

A finding of preemption in the case at bar hinges on the practical effect which the APSC's show cause order, if

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607, 150 N.E.2d 776 (1958); *Eastern Edison Company v. Department of Public Utilities*, 338 Mass. 292, 446 N.E.2d 684 (1983); *Northern States Power Company v. Minnesota Public Utilities Commission*, 344 N.W.2d 374 (Minn. 1984), certiorari denied 82 L.Ed. 2d 850; *United Gas Corporation v. Mississippi Public Service Commission*, 240 Miss. 405, 127 So.2d 404 (1961); *Northern States Power Company v. Hagen*, 314 N.W.2d 32 (N.D. 1981); *Citizens Gas Users Association v. Public Utilities Commission*, 165 Ohio St. 536, 138 N.E.2d 383 (1956).

[7]The petitioner's attempts to distinguish these cases on the basis that they arose under the Natural Gas Act, which gives the FERC jurisdiction over security issues by interstate natural gas pipelines, while no similar provisions exist with respect to electric utilities under the Federal Power Act. But the principle for which these cases stand, as the previously cited decisions show, is not unique to the Natural Gas Act.

not enjoined, would have had on Judge Liebman's order, which is essentially a factual question. Both the District Court and the Court of Appeals recognized that the Initial Decision would have been frustrated if MSE had been denied access to the capital markets so that Grand Gulf could not have been completed and the power sales contemplated by Judge Liebman could not have been made.[8] The District Court found that:

> If the actions of the APSC are not enjoined, the cost of capital to MSE will be raised to the point that the Project is jeopardized, and the ability of MSE to provide its multi-state wholesale customers with power will be irreparably impaired. *Middle South Energy, Inc., et al. v. Arkansas Public Service Commission, et al.*, 593 F.Supp. 366-67.

As the Eighth Circuit said, "essentially, the APSC is trying to secure for Arkansas the zero allocation embodied in the UPSA. Such a result would be contrary to the 36% allocation recently approved by the FERC in regulating the wholesale aspects of the Grand Gulf project." *Middle South Energy, Inc., et al. v. Arkansas Public Service Commission*, 771 F.2d 411. In short, both courts realized that the actions of the APSC could not square with the cost allocations established by the FERC, a critical factual determination to which this Court should defer. *See, Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574, 580, n. 6 (1980).

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[8]The Court of Appeals noted that counsel for the APSC had stated that "if the APSC voids AP&L's part (of Grand Gulf), the whole thing goes down the toilet." 772 F.2d 413, n.17. The Eighth Circuit also pointed out that the SEC had calculated that a delay of just one month in completing the Project would cost MSE $28 million. *Supra* at p. 409, n. 11.

III. THE DECISION BELOW DOES NOT CONFLICT WITH SUPREME COURT CASES INTERPRETING THE COMMERCE CLAUSE.

The petitioner has further alleged that the Eighth Circuit erred in affirming the District Court on Commerce Clause grounds. Beyond question, however, the Commerce Clause, standing alone, may prohibit state action which unduly restricts the free flow of trade among the states. *Armco, Inc. v. Hardesty*, — U.S. —, 104 S.Ct. —, 81 L.Ed. 2d 540 (1984). The result below is consistent with this rule.

The petitioner's attack on the Eighth Circuit's holding is threefold. First, the petitioner repeats its argument that the state action at issue herein is protected by PUCHA. Second, it is alleged that the Eighth Circuit misstated the APSC's motives in finding that the Commission was attempting to close the borders of Arkansas to power from Grand Gulf. Third, it was alleged that the APSC's order would have only an incidental effect on interstate commerce and should, therefore, have been permitted under *Pike v. Bruce Church*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970).

The first prong of the petitioner's argument is a repetition of previous allegations and has been adequately addressed under Point I herein.[9] The petitioner's second argument that the APSC was not trying to embargo Grand Gulf power contradicts the facts in the record, as the foregoing discussion makes clear. The APSC's show

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[9]The passages quoted by the petitioner from the SEC opinion rejecting the APSC's attempt to block MSE security issues not at issue herein do not, as the petitioner claims, support state jurisdiction regardless of constitutional considerations. Those passages simply refuse to decide the state law or federal preemption claims raised by APSC and do not even consider the limitations placed on the APSC by the Commerce Clause. *See, Petition*, pp. 53-54.

cause order itself recognized that "the construction of the Grand Gulf Project was and is dependent on the agreements enumerated" therein. *Appendix to Petition*, p. A-99. The APSC's attempted nullification of the Grand Gulf contracts must be seen as an effort to evade responsibility for Grand Gulf costs by destroying the Project itself.

In light of the APSC's recognition of the importance of the agreements it sought to void, the claim that the show cause order would have only an "incidental" effect on interstate commerce and should be upheld under *Pike v. Bruce Church, supra*, must be rejected. The Project was owned by a multi-state holding company, was designed to serve customers in several states, was financed by investors throughout the world and was not even located within the State of Arkansas. State action threatening such a facility would obviously have more than an incidental effect on interstate commerce.

The Court need not, however, reach the question of whether the APSC's order would have affected interstate commerce only incidentally. The flexible test established in *Pike v. Bruce Church, supra*, is inapplicable in cases involving the type of "economic protectionism" displayed by the APSC, to which a virtual *per se* rule of invalidity applies. *See, Bacchus Imports, Ltd. v. Dias*, 468 U.S. —, 104 S.Ct. —, 82 L.Ed.2d 200 (1984); *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 100 S.Ct. 2009, 64 L.Ed. 2d 702 (1980). A finding of "economic protectionism" may rest either on evidence of a discriminatory intent or a discriminatory effect. *Bacchus Imports, Ltd. v. Dias, supra*, at p. 208. A discriminatory intent can easily be inferred from the APSC's efforts before the FERC to shift Grand Gulf costs from Arkansas to ratepayers in Louisiana and Mississippi. As recently as September 9, 1985,

when it approved the stipulation settling AP&L's retail rate case, the APSC said that "it is a bitter pill to swallow to say that Arkansas must shoulder any of the burden of Grand Gulf." *Appendix to Memorandum of APSC, Exhibit C*, p. 28. As to a discriminatory effect, the destruction of the Project, which is the APSC's apparent objective, would have deprived citizens of other states of a major power supply, solely to protect the interests of Arkansas as perceived by the APSC. *See, New England Power Company v. New Hampshire, et al.*, 455 U.S. 331, 102 S.Ct. 1096, 71 L.Ed.2d 188 (1982).

IV. THE EXERCISE OF JURISDICTION BY THE COURTS BELOW WAS NOT BARRED BY THE ABSTENTION DOCTRINE.

The petitioner has alleged that the courts below should have abstained from exercising jurisdiction. The abstention doctrine, however, is based on the need to respect lawful state procedures, not clearly *ultra vires* efforts to circumvent federal regulation. *See, Public Utilities Commission of Ohio v. United Fuel Gas Corporation*, 317 U.S. 456, 63 S. Ct. 369, 87 L.Ed. 396 (1943) (enjoining state Commission order attempting to set wholesale gas rates). The mere pendency of the show cause proceeding would have jeopardized MSE's ability to secure financing to complete the Project. Even if the APSC had ultimately decided not to abrogate the Grand Gulf contracts, abstention by the courts below would have at least delayed MSE's attempts to raise capital and would have increased the cost thereof.

V. THE EXERCISE OF JURISDICTION BY THE COURTS BELOW WAS NOT BARRED BY THE WELL-PLEADED COMPLAINT RULE.

Consistent with the weight of authority, the Eighth Circuit concluded that the possibility that the claims raised

by MSE in is complaint might also be raised as defenses by AP&L in the APSC's show cause proceeding did not bar the exercise of federal jurisdiction under the "well-pleaded complaint" rule. *See, Braniff International, Inc. et al. v. Florida Public Service Commission, et al.*, 576 F.2d 1100 (5th Cir. 1978); *Illinois v. General Electric Company, et al.*, 683 F.2d 206 (7th Cir. 1982); *Conference of Federal Savings and Loan Associations, et al. v. Stein*, 604 F.2d 1256 (9th Cir. 1979); *Town of Springfield, Vermont, et al. v. McCarren, et al.*, 549 F.Supp. 1134 (D. Vt. 1982). Moreover, earlier Eighth Circuit decisions allegedly applying the "well-pleaded complaint" rule in the manner now advocated by the petitioner were expressly repudiated by this Court in *Lawrence County, et al. v. Lead-Deadwood School District*, 460 U.S. —, 105 S.Ct. —, 83 L.Ed.2d 635, 640, n.6 (1985).

VI. THE CASE DOES NOT PRESENT A JUSTICIABLE ISSUE WITHIN THE JURISDICTION OF THE COURT.

Under Article III of the Constitution, this Court's jurisdiction is limited to "cases and controversies." To be justiciable within the requirements of Article III, a case must "present a legal and substantial controversy which unequivocally calls for adjudication of the rights" asserted. *Poe v. Ullman*, 367 U.S. 497, 509, 81 S.Ct. 1752, 61 L.Ed.2d 989 (1961) (Brennan, J., concurring). A case which, by the time it reaches this Court has become moot, cannot be considered to present a justiciable issue for purposes of the exercise of Article III jurisdiction. *See, North Carolina v. Rice*, 404 U.S. 244, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971).

On September 5, 1985, after the entry of the Eighth Circuit's opinion, the parties to the AP&L rate proceeding, including AP&L, the Attorney General of Arkansas, the

Commission Staff, the Southern Cotton Ginners Association, Arkansas Electric Energy Consumers and Reynolds Metals Company, entered into a Stipulation and Settlement Agreement. The petitioner was not a party to the rate case and, accordingly, was not a party to the agreement or the settlement negotiations. The agreement, besides settling the AP&L rate case, also represented a settlement of various collateral proceedings which the Grand Gulf controversy had spawned. In particular, it provided that:

> All of the aforementioned parties except AP&L agree to take such action as may be necessary to voluntarily dismiss without prejudice, terminate or withdraw their interventions in the following litigation concerning AP&L to the extent they have the ability to do so.
>
> a. MSE v. APSC, U.S. Court of Appeals for the Eighth Circuit Nos. 84-2409, 84-2410, 84-2480 and 84-2356. . . .
>
> e. APSC Docket No. 84-190-U. *Appendix to Memorandum of APSC, Exhibit B*, pp. 30-31.

On September 9, 1985, the Commission, by Order No. 26 in the AP&L rate case, approved the Stipulation and Settlement Agreement. AP&L implemented rates pursuant thereto immediately after the entry of the final order. On September 20, 1985, the APSC entered an order terminating Docket No. 84-190-U, the show cause proceeding the District Court had enjoined. *Appendix to Brief in Opposition*, Part E. By letter dated September 10, 1985, counsel for the APSC informed the Clerk of the Eighth Circuit that the APSC's petition for rehearing of that court's decision was being withdrawn. *Appendix to Brief in Opposition*, Part F.

The entry of a settlement or consent decree prior to the determination of a case by this Court will render an

otherwise justiciable controversy moot. *Verrot, et al. v. Oil Transport Company, Inc., et al.*, 365 U.S. 768, 81 S.Ct. 911, 6 L.Ed.2d 83 (1961); *J. Aron & Company v. Mississippi Shipping Company, Inc.*, 361 U.S. 115, 80 S.Ct. 212, 4 L.Ed.2d 148 (1959). Although the question of mootness is complicated in this case by the petitioner's efforts to obtain review, for all practical purposes, the case is moot. It must be remembered that the rights the petitioner seeks to vindicate are not its own rights, but are the rights of the State of Arkansas. The APSC and the Attorney General, the only parties below with obvious standing to defend state perogatives, have now agreed to the termination of the show cause proceeding enjoined by the lower courts. The Court should accord little weight to the petition of a private party seeking to represent the "public interest" against the actions of public officials which have the legal obligation to represent that interest.

Although the memorandum filed herein by the APSC did not oppose certiorari, the APSC set forth no grounds which would justify review and stated that "the Commission questions its ability to take a position in support of the granting of the petition," in light of the Stipulation and Settlement Agreement. *Memorandum of APSC*, p. 1. In essence, the APSC's response simply notified the Court that, if certiorari were granted, the APSC would seek to defend its show cause order. The only relevant substantive issue addressed by the APSC was the question of mootness, to which it responded that it did not "believe that all legal issues raised by the petition are moot. . . ." *Memorandum of APSC*, p. 14. The issues which the APSC believes are not moot apparently involve actions which the APSC might take in future proceedings if the Eighth Cir-

cuit's decision were reversed. Questions involving the APSC's possible future conduct, especially in light of the Stipulation and Settlement Agreement were not, however, raised by the decision below and are not before this Court with the degree of specificity or certainty that a case or controversy would require.

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CONCLUSION

For the reasons stated above, certiorari should be denied. A workable *status quo* has been achieved by the principal parties to this litigation which the respondents hope the Court will leave undisturbed. The substantive issues underlying the Grand Gulf controversy can be addressed in an appeal of FERC Opinion No. 234, now under review by the District of Columbia Court of Appeals.

Respectfully submitted,

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PART A

AVAILABILITY AGREEMENT

BETWEEN

MIDDLE SOUTH ENERGY, INC.

AND

ARKANSAS POWER & LIGHT COMPANY, ARKANSAS-MISSOURI POWER COMPANY, LOUISIANA POWER & LIGHT COMPANY, MISSISSIPPI POWER & LIGHT COMPANY, and NEW ORLEANS PUBLIC SERVICE INC.

THIS AGREEMENT, dated as of the 21st day of June, 1974, between Middle South Energy, Inc. (MSEI) and Arkansas Power & Light Company (AP&L), Arkansas-Missouri Power Company (Ark-Mo), Louisiana Power & Light Company (LP&L), Mississippi Power & Light Company (MP&L) and New Orleans Public Service Inc. (NOPSI), Witnesseth That:

Whereas, AP&L, Ark-Mo, LP&L, MP&L and NOPSI (collectively, System operating companies and, singly, System operating company), all outstanding shares of whose common stock are wholly owned by Middle South Utilities, Inc., operate electric generating, transmission and distribution facilities in the states of Arkansas, Louisiana, Mississippi and Missouri and comprise the Middle South System; and

Whereas, the System operating companies are parties to an agreement dated April 16, 1973 (as presently constituted and as amended in the future, System Agreement), which provides the contractual basis for the continued planning, construction and operation of certain fa-

cilities owned by the System operating companies to achieve the purposes set forth therein; and

Whereas, other entities may become parties to the System Agreement; and

Whereas, MSEI has been organized as a subsidiary of Middle South Utilities, Inc. to finance and own certain generating units for the benefit of the Middle South System, including the Grand Gulf Nuclear Electric Station project (Project), a two unit nuclear-fueled electric generating plant having an expected aggregate capacity of 2,500,000 KW and to be located near Port Gibson, Mississippi; and

Whereas, MSEI is, subject to the terms hereof, willing to undertake the construction and operation of the Project, to become a party to the System Agreement and to make available to the Parties, as hereinafter defined, all of the power (and the energy associated therewith) available at any MSEI Generating Unit, including the Project, under the terms hereof and of the System Agreement; and

Whereas, the Parties, as hereinafter defined, are, subject to the terms hereof, willing to purchase power (and the energy associated therewith) available or to be available at any MSEI Generating Unit, including the Project, under the terms hereof and of the System Agreement;

Now, therefore, in consideration of the terms and conditions hereinafter set forth, the parties hereto agree with each other as follows:

1. For the purposes of this Agreement, the following definitions shall apply:

(a) *Party or Parties* shall mean any entity or entities (other than MSEI) now or hereafter a party or parties to this Agreement.

(b) *MSEI Generating Unit* shall be that portion of any electric generator, together with its prime mover and all auxiliary and appurtenant devices and equipment designed to be operated as a unit for the production of electric power and energy and all associated equipment and facilities, which is owned by MSEI and which MSEI and the Parties have designated as being subject to this Agreement.

(c) *Power* shall mean both power and the energy associated therewith, including test power produced during construction or thereafter.

2. MSEI and the Parties hereby designate Unit No. 1 and Unit No. 2 of the Project as being subject to this Agreement and MSEI Generating Units hereunder, and MSEI hereby undertakes to use its best efforts to construct the Project.

3. On or before the date on which Unit No. 1 of the Project is placed in commercial operation, MSEI and the Parties will join in executing such document or documents as may be necessary for MSEI to become a party to the System Agreement. MSEI and the Parties will also join in executing at an appropriate time such document or documents as may be necessary for others who become parties to the System Agreement to join in and become parties to this Agreement. MSEI shall, subject to the provisions of the then applicable requirements of Section 6 of this Agreement and the then applicable provisions of the System Agreement (or any agreement substituted therefor), make available, or cause to be made available, to the Parties all Power available from time to time at any MSEI Generating Unit.

4. The Parties shall, subject to the provisions of the then applicable requirements of Section 7 of this Agreement and the then applicable requirements of the System Agreement (or any agreement substituted therefor) be entitled to receive all Power available from time to time at any MSEI Generating Unit; provided, that (i) should any Party terminate its participation in the System Agreement, then it is agreed that MSEI, such Party and the other Parties shall enter into a separate agreement whereby such Party shall continue to be entitled to receive Power, and obligated to take Power, available at any MSEI Generating Unit which has been designated as being subject to this Agreement at the time such Party shall exercise its right to terminate such participation, in such amounts and for such consideration calculated from time to time as if such Party had remained a party to the System Agreement, and (ii) should the System Agreement be cancelled or terminated then it is agreed that MSEI and all such Parties shall enter into a separate agreement whereby such Parties shall continue to be entitled to receive Power, and obligated to take Power, available at any MSEI Generating Unit which has been designated as being subject to this Agreement at the time of a cancellation or termination of the System Agreement, in such amounts and for such consideration calculated from time to time as if the System Agreement had remained in effect and MSEI and such Parties were parties thereto. Notwithstanding such withdrawal from, or cancellation or termination of, the System Agreement, each Party shall remain bound by the terms of this Agreement with respect to any MSEI Generating Unit which has been designated as being subject to this Agreement at the time of such withdrawal,

cancellation or termination. In consideration of MSEI's commitment to undertake construction of the Project and its other obligations hereunder and of the right of the Parties to receive Power available at any MSEI Generating Unit under the terms of the System Agreement (or any separate agreement referred to above), the Parties agree to pay to MSEI, commencing of the date on which a particular MSEI Generating Unit is deemed to be in operation for the purpose of this Agreement, such amounts from time to time as, when added to amounts received by MSEI from any other source, including, but not limited to, amounts (if any) received by MSEI with respect to such MSEI generating unit under the terms of the system agreement, shall be at least equal to MSEI's total operating expenses and interest charges with respect to such MSEI Generating Unit, including (without limitation), for the purposes of this Agreement, (i) all expenses, deductions, charges and other items properly chargeable to the applicable Income Accounts 400 to 435, inclusive, of the Uniform System of Accounts prescribed by the Federal Power Commission for Class A and Class B Public Utilities and licensees, as in effect on April 1, 1973, (Uniform System of Accounts) or, if such MSEI Generating Unit is not in service for any reason, all expenses, deductions, charges and other items which would be chargeable to the above Accounts if such MSEI Generating Unit were in service; it being agreed that when a particular generating unit is designated as being subject to this Agreement by MSEI and the Parties, then, solely for the purposes of determining MSEI's total operating expenses under this Section 4, such MSEI Generating Unit shall be deemed to be in operation on the date, and the accrual of depreciation as an

operating expense with respect to the MSEI Generating Unit shall be deemed to commence on the date at the rate and in the manner and continue for the duration, as is specified in the document so designating such generating unit as a MSEI Generating Unit subject to this Agreement, whether or not such MSEI Generating Unit is actually in operation on such date, and (ii) such expenses as might be incurred in connection with permanent shut-down of any MSEI Generating Unit which is nuclear-fueled and, in the event of any such shut-down, for perpetual maintenance and surveillance of any such facility in accordance with and as required by, all applicable regulations established by any governmental authority having jurisdiction. Payments to be made pursuant to this Section 4 shall be made monthly and shall be apportioned among the Parties whose Company Capability is less than its Capability Responsibility, as such terms are defined in the System Agreement and as determined in accordance with Section 10 of the System Agreement, in the ratio of each such Party's deficiency to the sum of the deficiencies of all such deficient Parties; provided, however, that if in any month no Party has such a deficiency then the payments for such month shall be apportioned among the Parties in accordance with the ratio of their then respective Capability Responsibilities, as such term is defined in the System Agreement. For the purpose of this Agreement, the Capability of all MSEI Generating Units shall be included in the System Capability, as such terms are defined in the System Agreement. In the event the System Agreement is not then in effect, or has been amended or interpreted so that at least one or more of the Parties is not obligated to make the entire pay-

ment herein provided, then the Parties agree to make payments hereunder in accordance with the ratio of their then respective "Capability Responsibilities", as such term is defined in Appendix A attached hereto and made a part hereof and not as defined in the System Agreement. Payments made by any Party to MSEI pursuant to this Section 4 shall be applied as a credit to such Party's liability for payments to MSEI under the System Agreement.

5. For the purpose of determining MSEI's expenses and the Parties' obligations under Section 4 of this Agreement, it is hereby agreed that both Unit No. 1 and Unit No. 2 of the Project shall be deemed to be in operation on the earlier of December 31, 1982 (whether or not such Units, or either of them, are then completed or in operation) or the date on which either of such Units is first place in commercial operation as determined under the System Agreement (or any agreement substitute therefor), and the accrual of depreciation and amortization with respect to the Project shall be deemed to commence on the earlier of such dates; that such accrual of depreciation and amortization shall be at the rate of 3.65% per annum of the aggregate amount properly chargeable (prior to the deduction therefrom of any depreciation or amortization) at the time with respect to the Project to Balance Sheet Accounts 101, 102, 103, 104, 105, 106, 107 (the aforementioned accounts being exclusive of land and land rights), 118, 120 (.1 through .5), 121, 123, 123.1, 124, 151, 152, 153, 154, 155, 156, 157, 163, 182, 183, 184, 185, 186, 187 and 188 of the Uniform System of Accounts and such other accounts as are properly subject to depreciation or amortization at the time pursuant to such Uniform System of Ac-

counts; and that such accrual shall continue during each of the first 27+ years after the date of commencement of such accrual hereunder whether or not such Units, or either of them, shall ever commence operation and/or remain in operation; provided, however, that if Unit No. 1 is placed in commercial operation prior to December 31, 1982 and Unit No. 2 is not completed and ready for service at such time, then until December 31, 1982 or the date Unit No. 2 is placed in commercial operation, whichever date occurs earlier, expenditures included in Account 107 which are identified exclusively with the construction of Unit No. 2 may be excluded from the calculation of the aggregate amount subject to the accrual of depreciation and amortization pursuant to this paragraph.

6. The performance of the obligations of MSEI hereunder shall be subject to the receipt and continued effectiveness of all authorizations of governmental regulatory authorities at the time necessary to permit MSEI to perform its duties and obligations hereunder including the receipt and continued effectiveness of all authorizations by governmental regulatory authorities at the time necessary to permit MSEI to finance, to construct or cause to be constructed, to operate or cause to be operated, and/or to make available to the Parties the Power available at any MSEI Generating Unit. MSEI shall use its best efforts to secure and maintain all such authorizations by governmental regulatory authorities.

7. The performance by each Party of its obligations hereunder shall be subject to the receipt and continued effectiveness of all authorizations of governmental regulatory authorities necessary at the time to permit it to perform its duties and obligations hereunder, including

the receipt and continued effectiveness of all authorizations by governmental regulatory authorities necessary at the time to permit it to pay to MSEI, in consideration for the right to receive its share of the Power available at any MSEI Generating Unit, the amounts provided for in Section 4 of this Agreement. Each Party shall use its best efforts to secure and maintain all such authorizations by governmental regulatory authorities. Each Party shall, to the extent permitted by law, be obligated to perform its duties and obligations hereunder, subject to the then applicable provisions of this Section 7, (a) whether or not MSEI shall have received all authorizations of governmental regulatory authorities necessary to permit MSEI to perform its duties and obligations hereunder or under the System Agreement, (b) whether or not such authorizations, or any such authorization, shall at any time in question be in effect, (c) whether or not the System Agreement shall, from time to time, be amended, modified or supplemented or shall be cancelled or terminated or such Party shall have withdrawn therefrom and (d) so long as MSEI and such Party shall continue to be subsidiary companies of Middle South Utilities, Inc. (as said term is defined in Section 2(a)(8) of the Public Utility Holding Company Act of 1935) or a successor thereto, whether or not, at any time in question, MSEI shall have performed its duties and obligations under this Agreement or the System Agreement. In the event that MSEI or any Party shall cease to be such a subsidiary company, then and thereafter such Party shall not be relieved of its obligation to make payments pursuant to Section 4 of this Agreement by reason of the failure of MSEI to perform its duties and obligations hereunder or under the System Agreement

occasioned by act of God, fire, flood, explosion, strike, civil or military authority, insurrection, riot, act of the elements, failure of equipment, or for any other cause beyond the control of MSEI.

8. To the extent they may legally do so, each Party and MSEI hereby irrevocably waive any defense based on the adequacy of a remedy at law which may be asserted as a bar to the remedy of specific performance in any action brought against it for specific performance of this Agreement by any other party to this Agreement, or by a trustee under any mortgage or other debt instrument which any such party to this Agreement may, subject to requisite regulatory authority, enter into, or by any receiver or trustee appointed for any such party under the bankruptcy or involvency laws of any jurisdiction to which any such party may be subject; provided, however, that nothing herein contained shall be deemed to constitute a representation or warranty by any party to this Agreement that their respective obligations under this Agreement are, as a matter of law, subject to the equitable remedy of specific performance.

9. No Party shall be entitled to set off against any payment required to be made by such Party under this Agreement (i) any amounts owed by MSEI to such Party or (ii) the amount of any claim by such Party against MSEI. The foregoing, however, shall not affect in any other way the rights and remedies of any Party with respect to any such amounts owed to such Party by MSEI or any such claim by such party against MSEI.

10. The invalidity or unenforceability of any provision of this Agreement shall not affect the remaining provisions hereof.

11. This Agreement shall become effective forthwith. This Agreement may be amended, modified or terminated only with the consent of MSEI and of the Parties then having responsibility for two-thirds or more of the amounts to be paid under Section 4 hereof, and upon the receipt and continued effectiveness of all authorizations of governmental regulatory authorities at the time necessary.

12. This Agreement shall be binding upon the Parties and MSEI and their respective successors and assigns, but no assignment hereof, or of any right to any funds due or to become due under this Agreement, shall in any event relieve any Party or MSEI of any of their respective obligations hereunder, or, in the case of the Parties, reduce to any extent their entitlement to receive Power available from time to time at any MSEI Generating Unit.

13. The agreements herein set forth have been made for the benefit of the Parties, MSEI and their respective successors and assigns, and no other person shall acquire or have any right under or by virtue of this Agreement.

In Witness Whereof, the parties hereto have caused this Agreement to be duly executed by their respective officers thereunto duly authorized as of the day and year first above written.

Arkansas Power & Light Company

Witness:

James A. Brignac

By Reeves E. Ritchie
President

Arkansas-Missouri Power Company

Witness:

Cheryl B. Young

By F. G. Smith
President

Witness:
Stephanie T. Tzamonte

Louisiana Power & Light Company
By E. A. Rodrigue
President

Mississippi Power & Light Company
By D. C. Lutken
President

Witness:
J. B. Ballinger

New Orleans Public Service Inc.
By William McCollam, Jr.
President

Witness:
Barbara Plaisance

Middle South Energy, Inc.
By F. W. Lewis
President

Witness:
J. E. Ammon

APPENDIX A

Definition of "Capability Responsibility"
As Used in Availability Agreement

"Capability Responsibility" shall mean: with respect to any "Company", the System Capability" multiplied by the "Responsibility Ratio" for that Company.

"Company" shall mean one of the Middle South Utilities, Inc.'s System operating companies, as defined in the Availability Agreement; "System Capability" shall mean the arithmetical sum in megawatts of the individual "Company Capabilities" shall be the net output in megawatts that can be produced by all of a Company's generating units, each unit of which consists of an electric generator, together with its prime mover and all auxiliary and appurtenant devices and equipment designed to be operated as a unit for the production of electric power and energy, under the conditions specified by the administrative organization then having the authority to so specify, under either the System Agreement or any similar and succeeding agreement to which such Company is a

party, or the input in megawatts available under contract to such Company from a supplying source; provided, however, that each Company shall be deemed to have at least one Kilowatt of Capability, whether or not it has any such Capability; "Responsibility Ratio" shall mean the ratio obtained by dividing a "Company Load Responsibility" by the "System Load Responsibility"; "Company Load Responsibility" shall mean (a) the average of the four highest clock-hour demands in megawatts of a Company's system, each on a different day, occurring during the twelve month period ending with the current month, but not less than 90% of the average of the four highest such demands occurring during the twenty-four (24) month period ending with the current month, where each such demand shall represent the simultaneous hourly input from all sources into the system of a company, less the sum of the simultaneous hourly outputs to the system of other interconnected utilities (Company demands shall include firm power supplied to other systems for its own account), (b) less the power supplied to others as sales for the joint account of all Companies, (c) less the contractual amount of firm purchases with reserves available during the month from other systems for its own account; provided, however, that each Company shall be deemed to have a Load Responsibility of at least one kilowatt, whether or not such Company has any such Load Responsibility; "System Load Responsibility" shall be the arithmetical sum in megawatts of the individual Company Load Responsibilities.

PART B

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

PUBLIC UTILITY HOLDING COMPANY ACT of 1935

Release No. 23579 / January 23, 1985

In the Matter of

MIDDLE SOUTH UTILITIES, INC.
MIDDLE SOUTH ENERGY, INC.
New Orleans, Louisiana

File Nos. 70-6906, 70-7021 and 70-7026

MEMORANDUM OPINION AND ORDER AUTHORIZING COMMON STOCK SALE AND ACQUISITION AND DENYING REQUEST FOR HEARING

AND

SUPPLEMENTAL MEMORANDUM IN CONNECTION WITH BOND FINANCINGS

Middle South Utilities, Inc. ("MSU"), a registered holding company, proposes to purchase and Middle South Energy, Inc., ("MSE") its subsidiary, proposes to issue and sell, at $1,000 per share, up to 160,000 common shares ($160 million) on or before July 31, 1985, all pursuant to Sections 7, 10 and other applicable provisions of the Public Utility Holding Act of 1935 ("Act"). MSU is MSE's sole stockholder, owning on September 30, 1984, $789.35 million, in common stock, all issued for cash in $1,000 shares. The proposed transactions would increase MSU's investment to $963.6 million.[1] Due notice was published

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[1] That includes $14.25 million balance of a prior authorization. *Middle South Utilities, Inc., et al.*, HCAR No. 23259 (March 23, 1984).

(HCAR No. 23413, September 6, 1984). The Arkansas Public Service Commission, ("Arkansas Commission") has intervened and requested a hearing. MSU and MSE filed a response, and the Arkansas Commission filed a reply.

1. *Organization and Capital Structure*

MSE, an Arkansas corporation, was organized in 1974 to own and finance the Grand Gulf nuclear generating project, at Port Gibson, Mississippi.[2] The plant is designed to be connected to the integrated electric transmission network of the Middle South system, which interconnects four electric utility subsidiaries of MSU, serving western Mississippi, Louisiana and Arkansas.[3] MPL had transferred to MSE the Grand Gulf project, but MPL is constructing the plant as MSE's agent, and is expected to operate the facility in the same capacity. South Mississippi Electric Power Association, a non affiliate, owns 10% of the project.

The Nuclear Regulatory Commission ("NRC") approved the Grand Gulf operating license for Unit 1 on July 31, 1984, which was issued the following month.[4] MSE has

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[2] *Middle South Utilities, Inc., et al.*, HCAR No. 18437 (June 4, 1974).

[3] Mississippi Power & Light Company ("MPL"), Louisiana Power & Light Company ("LPL"), New Orleans Public Service, Inc. ("NOPSI"), Arkansas Power & Light Company ("APL"). Arkansas Missouri Power Company, another subsidiary utility company, was consolidated with AP&L, *Middle South Utilities, Inc., et al.*, HCAR No. 21873 (December 31, 1980)

[4] NRC reissued the license November 1, 1984. A petition for review was filed October 1, 1984 in the United States Court of Appeals, District of Columbia Circuit, by Jacksonians United for Livable Energy Policies and is pending.

obtained extensions of dates required by its loan agreements for commercial operation of Unit 1 and deferrals of principal payments and related obligations. It currently expects to begin commercial operations in the first quarter of 1985.

On September 30, 1984, MSE had invested $3.7 billion in the project, of which $1.4 billion was allowance for funds used during construction ("AFUDC"), that is, tax adjusted interest expense and an allowance for return on equity during the construction period. Unit 1, a 1250 MW generating plant, represents a cost of $2.9 billion, and Unit 2, considered 34% complete, $.08 billion. Continued accrual of AFUDC and other capitalized expenses are expected to increase the cost of Unit 1 to about $3.1 billion by March 1985.

MSE has borrowed about $2.5 billion, of which $2.1 billion is construction financing under two bank loan agreements. We have authorized it to issue up to $250 million in pollution control financing and $400 million in first mortgage bonds. Our opinion on the bonds described more fully MSE's September 30, 1984 balance sheet and indebtedness.[5] The refunding therein referred to includes about $100 million of accrued interest on outstanding debt.[6] MSE

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5 *Middle South Energy Inc., et al.*, HCAR No. 23495 (November 23, 1984) and HCAR No. 23526 (December 12, 1984). For the terms of the sale see: HCAR Nos. 23545 (December 26, 1984) and 23546 (December 26, 1984), supplemented by HCAR No. 23555 (December 28, 1984).

6 Its interest expense for the 12 months ended September 30, 1984 was $331 million and $84 million had accrued on that date. Most of its debt provides for semi-annual interest payments, principally in January and February and July and August.

will have no revenues until Unit 1 is in service. MSE sharply curtailed construction on Unit 2 in 1979 and has, since 1983, devoted its resources to the completion of Unit 1.[7] The Mississippi Public Service Commission, which issued the certificate of public convenience and necessity for the project, has issued an order to show cause as to the continued construction and need for Unit 2.[8]

2. *MSE Financing and Related or Supporting Agreements*

The financing of MSE is supported by two agreements, dated June 21, 1974, one of which is the capital funds agreement between MSE and MSU. It obligates MSU to purchase MSE common stock as needed to maintain a common equity of at least 35% and provide such amounts as shall be required, in addition to MSE's other sources of funds, for construction, pre-operating expenses and interest on the project, to permit continuance of its operation, and to pay maturing MSE debt. The present proposal is the latest in a series of common stock sales to MSU previously authorized by orders under Section 6(a) and 7 of the Act.[9]

This Commission's order, issued on June 4, 1974, authorized the capital funds agreement and other transactions, including an availability agreement between MSE and the

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7 Interest payments, of course, are applicable to both units and MSE must protect and maintain its property.

8 *Mississippi Public Service Commission,* Docket No. U-4387.

9 *Middle South Utilities, et al.* HCAR Nos. 23259 (March 23, 1984); 23117 (November 29, 1982); 22555 (June 29, 1982); 22161 (August 14, 1981); 21754 (October 21, 1980); 21429 (February 12, 1980); 20327 (December 20, 1977); 20209 (October 12, 1977); 19836 (December 30, 1976).

associate electric utility companies.[10] MSE agreed to complete the Grand Gulf units, and to make available to the other subsidiary utilities the power generated by Grand Gulf. For all of which, these participating utilities agreed, severally and not jointly, to indemnify MSE, commencing not later than December 31, 1982, against loss by paying such amounts as, when added to other MSE revenues, would meet MSE's operating expenses, including depreciation at 3.65%, and interest. The original availability agreement provided that availability obligations would be allocated monthly among the operating companies in proportion to reserves or deficiencies as defined in the system agreement.

The operating subsidiaries in the Middle South system have been an integrated system since 1930.[11] As an integrated system, the operating companies have been parties to a series of system agreements governing intercompany sales of electric energy, as well as the planning, construction and operation of generation and transmission facilities. These agreements are regulated by the Federal Energy Regulatory Commission ("FERC") under the Federal Power Act. The availability agreement contemplated that MSE would become a party to the system agreement when it commenced selling electric energy, but provided for alternatives. The parties, in 1982, formalized that understanding by signing a unit power sales contract with MSE, and also amended the system agreement, both

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10 *Middle South Utilities, Inc., et al.* HCAR No. 18437 (June 4, 1974).

11 *Electric Power & Light Corp. et al.*, 29 SEC 52, 63 (1949).

of which were filed with FERC and are related to the pending proceedings.

Both the capital funds agreement and the availability agreement have been assigned by MSE to secure bank loans, mortgage bonds and pollution control financing. In each case the operating utility companies executed consents to the assignments.

Our order of June 22, 1981, authorized additional financing for Grand Gulf and amendments to the availability agreement.[12] As then amended, the availaiblity agreement provided for the intended allocation of MSE's share of the power and energy from Grand Gulf and the indemnity obligations in stated percentages: APL—17.1%, LPL—26.9%, MPL—31.3%, NOPSI—24.7%.

It later appeared, on the basis of new forecasts, that APL would not need Grand Gulf energy, and on November 18, 1981, we approved further amendments to the availability agreement which relieved APL of its obligations for power and energy from both units as well as the indemnity obligations, as follows:

		Amendment 1	Amendment 2
	(Both Units)	Unit 1	Unit 2
APL	17.1	—0—	—0—
LPL	26.9	38.57	26.23
MPL	31.3	31.63	43.97
NOPSI	24.7	29.80	29.80

As the banks and other lenders did not join in this amendment, APL remains obligated under the availability agree-

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12 *Middle South Energy, Inc., et al.*, HCAR No. 22098 (June 22, 1981).

ment, but LPL, MPL and NOPSI have agreed to indemnify APL for its obligations in proportion of their allocated capability and energy of Grand Gulf units.[13].

In the amendment to the availability agreement of June, 1981, the date for commencement of the indemnity payments was deferred. The operating utility companies—LPL, MPL, and NOPSI—agreed instead to commence on January 2, 1984, to make advance payments for power at the rate of $12.5 million per month, or $150 million per year. These payments will continue until commercial operations of Unit 1 or December 31, 1985, whichever occurs sooner. Thereafter, if Unit 1 is not in operation, deficiencies in revenues, as defined, will be governed by the amended availability agreement, under which APL has been effectively excluded.

On June 10, 1982, MSE, MPL, LPL and NOPSI, but not APL, entered into a unit power sales agreement. MSE agreed to sell all of the capacity and energy available to it from Grand Gulf to the three operating utilities in accordance with the percentages specified in the availability agreement as last amended in November 1981. Charges for this unit energy are to be computed monthly on the basis of MSE's total cost of service. The agreement was filed with FERC and hearings were held before an Administrative Law Judge.

The initial decision upheld the original proposal in many respects.[14] It recommended that MSE be granted a 16.04%

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13 *Middle South Energy, Inc., et al.*, HCAR No. 22280 (November 18, 1981).

14 *Middle South Energy, Inc.*, Docket No. ER-82-616-000. The initial decision was rendered on February 3, 1984, 26 FERC 166,044.

rate of return on common equity rather than 18% proposed by MSE and that its method of proposed depreciation be approved. There was sharp disagreement on the proposed allocation of capacity and energy. APL and the Arkansas Commission, among others, urged approval of the allocations as initially filed. The initial decision accepted a proposal of the Louisiana Public Service Commission to allocate energy from unit one of Grand Gulf as follows: APL—36%, LPL—14%, MPL—33%, NOPSI—17%. It found that the failure to allocate any portion of Grand Gulf power and costs to APL grants an undue preference to APL and unduly discriminates against the other operating companies and their customers in the Middle South system, contrary to Section 206 of the Federal Power Act. APL and the Arkansas Commission have filed exceptions and appealed to the full Commission, and the case is still pending.

3. *Discussion of Issues*

The issue and sale of common stock by MSE is subject to Section 7,[15] subsection (g) of which requires compliance with state laws.[16] The acquisition of the stock by MSU re-

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[15] The jurisdiction of this Commission with respect to the availability agreement existed under Section 12(b) of the Act as to the indemnity obligations of the four operating companies to MSE and as to the indemnity that three of the companies gave to APL. The contracts for the sale of electric energy among the subsidiaries of MSE are subject to the exclusive jurisdiction of FERC. Generally a contract for sale of goods and services to an associate company is governed by Section 13(b) of the Act, but Section 2(a)(20), which defines "Sales contract," expressly excludes sale of "electric energy or natural or manufactured gas."

[16] Section 7(g) provides that if a State commission having jurisdiction over the securities of the issuing companies

(Continued on following page)

quires approval under Section 10, and subsection (f) thereof also requires compliance with applicable state laws.[17] Neither the sale nor the acquisition in this case is subject to approval by the Arkansas Commission. MSU is a holding company, and all of the property of MSE is in Mississippi. Neither is subject to the public utility laws of Arkansas.[18]

Since the Arkansas Commission has no jurisdiction over MSE's sale and issuance of its common stock, Section 7(g) of the Act does not operate to prohibit this Commission from allowing the declaration to become effective. Thus, this Commission may proceed to consider whether the proposed common stock sale is necessary or appropriate in the public interest or for the protection of investors or consumers.

The Arkansas Commission's objection is related to the availability agreement of 1974 and as amended in 1981. It claims that the indemnity obligation of APL under that agreement is or may be an "evidence of indebtedness" un-

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(Continued from previous page)

informs this Commission that state laws have not been complied with in respect to the issuance of the securities, this Commission "shall not permit a declaration . . . to become effective until and unless the Commission is satisfied that such compliance has been effected."

17 Section 10(f) provides that the Commission shall not approve an acquisition unless it appears to the Commission "that such State laws as may apply in respect to such acquisition have been complied with . . ."

18 The Arkansas Attorney General admits that the Arkansas Commission has no jurisdiction over MSE's stock issuances. *See Brief of the State of Arkansas in Support of its Motion to Dismiss*, at 14.

der Arkansas law, which requires approval of the Arkansas Commission, and that without its approval APL's obligation is void.[19] The Arkansas Commission did not intervene in the 1974 and 1981 proceedings.

The short and simple answer is that the indemnity obligations in the availability agreement do not extend to the common stock which MSU now owns or proposes to buy from MSE. Moreover, the assignment of the availability agreement in connection with the bond issuances does not constitute an issuance or sale by APL of a security and therefore does not grant the Arkansas Commission the type of jurisdiction prerequisite to Section 7(g).

Our approval of the availability agreement, and the amendments in 1981, did not mean that Arkansas state law was preempted. Section 21 declares that nothing in the Act shall affect the jurisdiction of any other commission over "any person, security, or contract . . ." so long as such jurisdiction is not in conflict with the Act, or rule or order thereunder. The authorization of the availability agreement in 1974 and the amendments in 1981 determined only that Federal requirements under the Act have been met.

That, it seems, was understood by the Arkansas Commission. On August 1, 1984, the Arkansas Commission issued an order to show cause, returnable August 31, why APL's obligations "should not be held to be void *ab initio* as a

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[19] The Arkansas statute provides that a public utility may not " . . . issue stock, bonds, notes or other evidence of indebtedness payable at periods of more than thirty-six (36) months . . . " without authorization of the Arkansas Commission. Ark. Stat. Ann. § 73-255 (1983 Cumm. Supp.).

matter of law."[20] Its order referred to all contractual obligations affecting APL, including the availability agreement previously described.

MSE and APL filed suit for permanent injunction against the Arkansas Commission, and after a hearing upon extensive briefs the federal district court, on September 14, 1984, issued its Memorandum Opinion and Judgment permanently enjoining the Arkansas Commission from further proceeding under its order to show cause.[21] The federal court held that the Arkansas Commission had no authority to inquire into the agreements with MSE because they relate to the sale and purchase of wholesale power within the exclusive jurisdiction of FERC.

The Arkansas Commission states that until the injunction of the federal court is dissolved, it lacks an alternative forum, except under the Act, in which to assert its interest. The Arkansas Commission may appeal and reinstate its own proceeding that is now enjoined, and, we are informed, it has appealed. The Arkansas Commission is assured under Section 21 that neither the order in this case authorizing the sale and purchase of the MSE common stock, nor the authorizations of the bond financings supersede requirements of state laws as they may eventually be established in respect to APL's commitments in the financing of the Grand Gulf project.

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20 *In the Matter of an Order for Arkansas Power & Light Company, etc.*, Docket No. 84-190-U, Order No. 1, page 6.

21 *Middle South Energy, Inc., and Arkansas Power & Light Co. v. Arkansas Public Service Commission, et al.*, No. LR-C-84-778 (E.D. Ark. 1984).

The Arkansas Commission now claims that the obligations of APL under the availability agreement are subject to Section 7(g). It assumes that the assignment of APL's indemnity involves an issuance or sale of a "security" under Section 6(a) of the Act.[22]

The contractual arrangement to which the Arkansas Commission objects was entered into in 1974 and amended in 1981. In each of those instances this Commission reviewed the agreement under the Act. The Arkansas Commission had the opportunity to seek to intervene in all proceedings but did not. At this time that contractual agreement is not before this Commission. Instead the Commission is reviewing transactions in connection with which MSE has assigned its rights under the availability agreement.

These two contractual arrangements, though related, must be distinguished. There are first the indemnity commitments to MSE under the availability agreement by the four operating utilities. The other is the assignment by MSE of the availability agreement as a security interest for its debts. The indemnity commitments obligate the operating utilities for MSE's revenue deficiencies to cover its expenses, depreciation and interest, and the assignment transfers the right to receive the indemnity payments for which the operating utilities are already obligated. As to MSE's issuance of the two types of bonds, the assignment does not alter the character of APL's ob-

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[22] We do not decide whether or not the APL's indemnity constitutes a "security" in this case. As discussed below, even if the indemnification constitutes a security for purposes of Sections 6 and 7, there has been no issuance or sale in these transactions, only an assignment by MSE of its rights as indemnitees.

ligation nor the indemnity undertaking that LPL, MPL and NOPSI have given to APL. The assignment creates no new obligation for APL, and the consent by APL to MSE's assignment does not involve the issuance or sale of a security by APL.

If APL's indemnity constitutes a security for purposes of the Holding Company Act, the issuance of the security occurred upon the execution of the availability agreement. At that time the extent of APL's potential liability was uncertain. However, it is clear that the parties fully recognized that MSE would borrow construction and operating funds in the future. The transactions discussed here are only the realization of the parties' expectations.

Since the Arkansas Commission's jurisdiction extends only to APL and APL did not issue securities in connection with the sale of the pollution control and first mortgage bonds, the Arkansas Commission could not invoke 7(g) to prohibit the Commission from considering those declarations.

Finally, it is not expected that this Commission decide in each case what is required to comply with state laws under Section 7(g) in case of financings. An authorization that does not prejudice the State commission's authority under state law, as we said in connection with MSE's first mortgage bonds, "is sufficient assurance of compliance with any applicable state law."[23]

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23 *Middle South Energy, Inc.*, HCAR No. 23526 (December 12, 1984); *Middle South Utilities, Inc., et al.*, HCAR No. 23495 (November 23, 1984).

MSE denies that authorization by the Arkansas Commission is required and the Federal court has enjoined the Arkansas Commission from holding hearings under its order to show cause. In effect, the Arkansas Commission requests a stay of all financing authorizations by us until the issues regarding state law are resolved.

The probable outcome of the litigation over the applicability of Arkansas law and the constitutional issue that has developed is uncertain. But the effect upon MSU, MSE and its associate companies that are committed to Grand Gulf is not a matter of surmise.

Unit No. 1 is completed and is expected to be in service early in 1985. About $3 billion has been spent on its construction. MSU has supplied about $790 million in equity. MSE debt obligations have to be met, and the proposed mortgage and equity financings are necessary to reduce outstanding debt to maintain or renew lines of credit with the banks. APL has to date provided no capital funds, and the three other operating utilities have agreed to indemnify APL for any liabilities under the availability agreement. APL and the Arkansas Commission have appealed to FERC to reinstate the initial unit power sales agreement, under which APL would not be obligated to purchase any power from Grand Gulf. It is even probable that if it succeeds at FERC, and in view of the indemnity to APL by the three other operating companies, the Arkansas Commission would not pursue the issues regarding the applicability of Arkansas law.

The Arkansas Commission raises or suggests a broad range of other questions that are inconsequential, irrelevant or beyond our authority under the Act. Construction

of a nuclear power plant involves several agencies. MSE, as a Mississippi utility, holds a certificate of convenience and necessity from the Mississippi Commission. It has been granted an operating permit by NRC. It will sell its energy at wholesale, so that its rates are subject to FERC under the Federal Power Act. Our authority is limited to the financing and refunding aspects of the project.

The Arkansas Commission suggests that a hearing it requests we should consider discontinuance or moth-balling of the project. It overlooks, as has been decided several times, that we have no authority to review the construction of generating facilities of the holding-company system or which facilities should be built, abandoned or deferred.[24] We note also that to pospone construction or to leave the facilities idle would not relieve MSE of its obligations on borrowed funds, or MSU under the capital funds agreement, or the operating utilities of their obligations under the availability agreement. Any delay in commercial operation would increase costs by about $28 million per month primarily as a result of finance charges.

The Arkansas Commission suggests, as an alternative, that Grand Gulf be financed as a facility under direct ownership of the operating companies. That is a form of ownership permitted under the Act, as are other variants, including the present arrangement. The choice is essen-

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[24] *The Southern Company*, HCAR No. 21766 (October 29, 1980), *aff'd*, without opinion, *sub nom. Herring v. SEC*, 672 F.2d 894 (D.C. Cir. 1981); *Georgia Power Company*, HCAR No. 21737 (October 1, 1980), *aff'd, sub nom. Herring v. SEC*, 673 F.2d 1191 (11th Cir. 1982); *Alabama Power Company*, HCAR No. 21711 (September 10, 1980); *The Southern Company, et al.*, HCAR No. 21665 (July 24, 1980); *Georgia Power Company*, HCAR No. 23330 (June 15, 1984).

tially management's. Grand Gulf, originally a project of MPL, was transferred to MSE in 1974, and has been financed on that basis. Ownership and organization cannot be altered without refunding some $2.5 billion of outstanding debt. Any change in existing ownership and debt refunding will require our approval and that of several other agencies, including State commissions. Now is hardly the time to consider such far-reaching proposals. MSU and the other companies that want to complete Grand Gulf are content with the decision made ten years ago, and it has not been without advantage to the participating utilities. The entire risk of 35% capital investment is upon MSU. The operating utilities have not been required to provide any capital and, because of the indemnity arrangements, APL has provided no funds either as capital or for debt service.

Finally, the Arkansas Commission suggests that a hearing under Section 7(d) is needed to explore the proposed common stock and debt financings in terms of MSE's earning power.[25] Obviously, a company organized to construct a generating plant has no revenues or income. The financing of construction necessarily depends on committing the credit of the sponsoring or supporting utilities. Stock subscriptions, guarantees and unconditional long-term contracts assuring payment of full cost regardless of energy output have provided the necessary credit for a project company that has no income of its own during construc-

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[25] Section 7(d)(2) provides that we not authorize a proposed financing that is not reasonably adapted to the earning power of the issuer.

tion.[26] In this case, MSE's financial support is based on the capital funds agreement with MSU, the availability agreement, advances for purchase power and the unit power sales contract now before FERC.

In our prior orders in connection with the first mortgage bonds and pollution control bonds (HCAR Nos. 23526 (December 12, 1984) and 23495 (November 23, 1984)), we stated that a supplemental opinion will address in detail all the Arkansas Commission's objections. The foregoing discussion is to be considered the supplemental opinion for each of these financing orders.

On December 21, 1984, the State of Arkansas, through its Attorney General, filed its appearance in this proceeding, a motion to dismiss and supporting brief. It is urged that the indemnity obligation of APL is an evidence of indebtedness which requires approval of the Arkansas Commission; and that, as no such approval has been obtained, the application-declaration in respect of the common stock financing (File No. 70-6906) be dismissed in light of Section 7(g) of the Act. A separate motion is made on essentially the same grounds to reconsider and not to per-

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26 *The Potomac Edison Company*, HCAR No. 17054 (March 17, 1971); *Indiana and Michigan Power Co.*, HCAR No. 17247 (August 23, 1971); *Maine Yankee Atomic Power Co.*, 43 SEC 764, 766-767 (1968); *Vermont Yankee Nuclear Power Corp.*, 43 SEC 693, 695-696 (1968); *Connecticut Yankee Atomic Power Co.*, 41 SEC 715-716 (1963); *Yankee Atomic Electric Corp., et al.*, 36 SEC 552, 558-559 (1955); *Electric Energy Inc. et al.*, 32 SEC 495, 496-498 (1951); *Virginia Public Service Generating Co.*, 6 SEC 419, 423-424 (1939); *Dresser Power Corp. et al.*, 6 SEC 38, 41-42 (1939) in which a contract to lease or purchase the property on completion was used instead of a contract to purchase its output.

mit the sale of first mortgage bonds of MSE (File No. 70-7021), which we authorize by order of December 12, 1984 (HCAR No. 23526). A similar motion for reconsideration and hearing was filed on the same day by the Arkansas Commission. All these motions present no new issues.

There are no genuine or relevant issues of fact, and a hearing is not needed and will be denied.[27] The issue and sale of MSE stock to MSU meets all the standards of the Act.

> IT IS ORDERED, accordingly, that the proposal of MSE to sell common stock and the acquisition thereof by MSU are granted, effective forthwith, subject to Rule 24 under the Act; and
>
> IT IS FURTHER ORDERED that the request for a hearing be, and it hereby is, denied, and
>
> IT IS FURTHER ORDERED that the motion of the State of Arkansas, by its Attorney General, to dismiss the proposal to sell the MSE common stock to to MSU be, and it hereby is, denied; and
>
> IT IS FURTHER ORDERED that the motions to reconsider our prior authorization of MSE's first

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[27] *See Herring v. SEC*, 673 F.2d 1191, 1192-93 (11th Cir. 1982); *The Southern Company*, HCAR No. 21766, 21 SEC Docket 380 (October 29, 1980); *aff'd without opinion, Herring v. SEC*, 672 F.2d 894 (D.C. Cir. 1981); *Assoc. of Mass. Consumers, Inc. v. SEC*, 516 F.2d 711, 714-16 (D.C. Cir. 1975); *Bell Telephone Company of Pennsylvania v. FCC*, 503 F.2d 1250, 1267-68 (3rd Cir. 1974); *See also Gulf States Utilities Company v. FPC*, 411 U.S. 747, 754-55 (1973); *City of Lafayette La. v. SEC*, 454 F.2d 941, 954-56 (D.C. Cir. 1971).

mortgage bond financing be, and they hereby are, denied."

By the Commission.

/s/ John Wheeler
Secretary

PART C

BEFORE THE
ARKANSAS PUBLIC SERVICE COMMISSION

DOCKET NO. 84-040-0II

ORDER NO. 1

IN THE MATTER OF AN INVESTIGATION INTO THE OPERATION OF ARKANSAS POWER & LIGHT COMPANY AS A SUBSIDIARY OF MIDDLE SOUTH UTILITIES, INC.

ORDER INSTITUTING INVESTIGATION

As the result of recent developments in two proceedings now pending before the Federal Energy Regulatory Commission (FERC)* which portend catastrophically enormous rate increases for all classes of customers of Arkansas Power & Light Company (AP&L), the Arkansas Public Service Commission has determined that it should conduct an investigation into the facts, law, and circumstances underlying the relationships between AP&L, its affiliates, and its parent holding company, Middle South Utilities, Inc. Such an investigation is necessary in order to gauge the effect such intercorporate relationships have had or may have upon the rates charged AP&L's customers and upon the authority and ability of the State of Arkansas, and this Commission in particular, to set retail electric rates for AP&L.

More specifically, the purpose of the investigation hereby instituted is to make findings of fact concerning:

(1) The events leading up to the construction of the Grand Gulf Nuclear Project in the State of Mississippi.

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*Middle South Energy, Inc., FERC Docket No. ER82-616-000, hereafter referred to as the Grand Gulf case, and Middle South Services, Inc., FERC Docket No. ER82-483-000, hereafter referred to as the System Agreement case.

(2) The various agreements and contracts signed by AP&L and other Middle South subsidiaries affecting the planning, construction and financing of, and the obligations of certain companies to pay for, the Grand Gulf plant.

(3) The overall System Agreement signed by the Middle South operating companies in 1973 and all predecessor and successor agreements among the parties to the Middle South power pool.

(4) The representations made to this Commission and other regulatory bodies at various times and in certain proceedings by AP&L and Middle South Utilities, Inc. (including its subsidiaries), concerning the aforementioned events, relationships, agreements, and contracts.

In conducting this investigation, the Commission wishes to enlist the assistance and cooperation of all interested persons having knowledge of facts, events, and circumstances pertinent to the inquiry. Thus, while the general nature of the investigation shall be as stated above, the Commission invites preliminary comments from the public concerning the particular questions which should be addressed in the investigation. All preliminary comments should be received by the Commission no later than Monday, April 2, 1984. Such preliminary comments may be submitted informally, in writing, in the form of statements or letters to the Secretary of the Commission.

After reviewing the preliminary comments, the Commission will issue an Order more specifically focusing the investigation, posing questions, and requesting information. At that time a schedule for the filing of testimony

and/or responses by AP&L and other interested persons will be established. A hearing in this docket shall be held at 9:00 A.M. on Tuesday, May 5, 1984, in the Commission Hearing Room on the First Floor of the new Public Service Commission Building, 10th & Center Streets, Little Rock, Arkansas.

As should be apparent, this investigation is intended to be *retrospective* in nature. It should be distinguished from the companion Order Instituting Investigation 84-041-OII, also issued this date, which is designed to examine *prospectively* the alternatives and remedies that may be available to the Commission and the State of Arkansas in grappling with the various possible outcomes of the Grand Gulf and System Agreement cases as they proceed through FERC and the federal courts. As the product of both investigations, the Commission expects to issue a report and declaration of the facts which will be provided to the Governor, the General Assembly, and the public as a foundation for the discussion of possible remedial state legislation to protect the interests of the residential, business, and industrial customers of AP&L and preserve the viability of the economy of the State of Arkansas.

Therefore, pursuant to the powers vested in this Commission under Ark. Stat. Ann. §§ 73-202 and 73-218 (Repl. 1979),

IT IS ORDERED THAT:

1. This Commission hereby initiates investigation into the operation of Arkansas Power & Light Company as a subsidiary of Middle South Utilities, Inc.

2. All interested persons shall submit Preliminary Comments suggesting particular questions or avenues of inquiry on or before Monday, April 2, 1984. Such Preliminary Comments may be in the form of statements or letters to the Commission and should reference Docket 84-041-OII. They may be mailed to the Secretary of the Commission at P.O. Box C-400, Little Rock, AR 72203.

3. A hearing in this Docket shall be held at 9:00 A. M., on Tuesday, May 8, 1984, in the Commission Hearing Room, First Floor of the new Public Service Commission Building, 10th & Center Streets, Little Rock, Arkansas.

BY ORDER OF THE COMMISSION

This 12th day of March, 1984.

/s/ Robert E. Johnston,
Dr. Robert E. Johnston, Chairman

/s/ James W. Daniel
James W. Daniel, Commissioner

/s/ Patricia S. Qualls
Patricia S. Qualls, Commissioner

/s/ Amy Brooks
Secretary to the Commission

I hereby certify that the foregoing order issued by the Arkansas Public Service Commission has been served on all parties of record this date, by U.S. Mail with postage prepaid, being the address of each party as indicated in the official docket file.

/s/ Amy Brooks date 3-12-84
Secretary of the Commission

PART D

ARKANSAS PUBLIC SERVICE COMMISSION

DOCKET No. 84-041-0II

ORDER NO. 1

IN THE MATTER OF AN INVESTIGATION INTO THE EFFECT ON RETAIL RATES CHARGED BY ARKANSAS POWER & LIGHT COMPANY OF FEDERAL ENERGY REGULATORY COMMISSION DECISIONS INVOLVING MIDDLE SOUTH UTILITIES AND THE ALTERNNATIVES AND REMEDIES AVAILABLE TO THE ARKANSAS PUBLIC SERVICE COMMISSION AND THE STATE OF ARKANSAS IN MITIGATION OF SUCH EFFECTS

ORDER INSTITUTING INVESTIGATION

On February 3, 1984, an administrative law judge of the Federal Energy Regulatory Commission (FERC) issued an initial Decision Concerning Sales of Power From the Grand Gulf Nuclear Generating Plant in FERC Docket No. ER82-616-000 (hereinafter referred to as "the Grand Gulf case"). The effect of this decision, should it be affirmed by the full FERC and the courts, would be to increase rates to Arkansas Power & Light Company (AP&L) customers by approximately $310 million in 1985 and by similar (but, perhaps, declining) amounts in subsequent years. The Grand Gulf case and a second case, also filed by a subsidiary of Middle South Utilities, Inc., and styled *Middle South Services, Inc.*, in FERC Docket No. ER82-483-000 (known as "the System Agreement case"), together present the stark specter of rate increases to AP&L customers of $3.5 billion or more during the next ten years.

Increases of such magnitude would translate into rate hikes in the range of 40% on an annual basis for all classes of AP&L customers.

The intolerable burden such dramatic increases would place on the customers of AP&L and the crippling effect they would have on the economy of Arkansas necessitate that the Arkansas Public Service Commission conduct a searching inquiry into the alternatives and remedies that may be available to the Commission, AP&L, and the State of Arkansas acting through the Governor and the General Assembly in addressing this stunning prospect. Therefore, the Commission has determined to initiate an investigation into all possible options that may be within reach, lawful, and effective in protecting the interest of the residential, business, and industrial ratepayers of AP&L and preserving the competitiveness and viability of the State's economy.

The procedure to be followed in this 0II Docket will mirror that in 64-040-0II which is a retrospective inquiry into the events which have led up to the dilemma with which the Commission and the State of Arkansas are now faced as the result of the recent developments in the two FERC cases. This investigation, however, will look forward to ascertain what the ratepayers of AP&L, AP&L itself, the Commission, the Governor, and the General Assembly may do to circumvent or deflect the economic harm that looms over the State from the imminent prospect of being mandated by a federal agency to pay for a power generating plant that is possibly neither needed or wanted by anyone in Arkansas, for which a certificate of need appears never to have been sought by AP&L nor granted by

this Commission, and that would, if forced upon the State, potentially result in such immense amounts of excess generating capacity that it could neither be used nor sold by AP&L.

As a first step in conducting this investigation, the Commission hereby issues an invitation to all interested persons, including AP&L and its customers of all classes, to submit preliminary comments concerning the specific options and remedies which should be examined by the Commission in this inquiry. All such preliminary comments should be received by the Commission no later than Monday, April 2, 1984. These comments may be submitted informally, in writing, in the form of statements or letters to the Secretary of the Commission.

After conducting a review of the preliminary comments, the Commission will issue an Order more specifically focusing the investigation, posing questions, and requesting information. At that time a schedule for the filing of testimony and/or responses by AP&L and other interested persons will be established and a date for the commencement of hearings, which will be held from time to time as we deem necessary, will be set.

At the conclusion of this investigation, the Commission expects to issue a report and declaration of the facts concerning the alternatives evaluated which will be provided to the Governor, the General Assembly, and the public. Such findings of fact are intended to be aids to the consideration of legal and legislative action that may become necessary in the future to deal with the problems presented by the FERC cases.

In preparing preliminary comments, the Commission urges all interested persons to address matters outside of the subject of the legal proceedings and appeals of the FERC decisions, since all Arkansas parties to those cases are already diligently pursuing this alternative.

THEREFORE, pursuant to the powers vested in this Commission under Ark. Stat. Ann. §§73-202 and 73-218 (Repl. 1979),

IT IS ORDERED THAT:

1. This Commission hereby initiates an investigation into the effect on retail rates charged by Arkansas Power & Light Company of Federal Energy Regulatory Commission decisions involving Middle South Utilities, Inc., and the alternatives and remedies available to the Arkansas Public Service Commission and the State of Arkansas in mitigation of such effects.

2. All interested persons shall submit Preliminary Comments suggesting particular questions or avenues of inquiry in this docket on or before Monday, April 2, 1984. Such Preliminary Comments may be in the form of statements or letters to the Commission and should reference Docket 84-040-0II. They should be mailed to the Secretary of the Commission at P. O. Box C-400, Little Rock, AR 72203.

By ORDER OF THE COMMISSION

This 12th day of March, 1984.

/s/ Robert E. Johnston, Chairman
/s/ James W. Daniel, Commissioner
/s/ Patricia S. Qualls, Commissioner

/s/ Amy Brooks
Secretary to the Commission

(Stamp)

PART E

ROSE LAW FIRM
A Professional Association
ATTORNEYS

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U. M. ROSE
1834-1913

September 10, 1985

Mr. Robert D. St. Vrain, Clerk
8th Circuit Court of Appeals
511 U.S. Court and Customs House
St. Louis, Missouri 63101

Re: Middle South Energy, Inc., et al. v. Arkansas Public Service Commission, et al., Nos. 84-2356-EA, 84-249, 84-2410 and 84-2480.

Dear Mr. St. Vrain:

On September 6, 1985, we filed on behalf of Appellants a Petition for Rehearing by Panel and Suggestion for Rehearing En Banc.

By agreement with Appellees, we request that our Petition be withdrawn from consideration. Thank you for your attention in this matter.

Yours very truly,

/s/ Carol S. Arnold

csa:jm

cc: Mr. Michael Thompson
Mr. Jerry D. Jackson
Mr. Steve L. Riggs
Mr. Robert Wood
Mr. Jay T. Youngdahl
Mr. Louis H. Willenken
Mr. N. M. Norton, Jr.

PART F

ARKANSAS PUBLIC SERVICE COMMISSION

DOCKET NO. 84-190-U
ORDER NO. 5

IN THE MATTER OF AN ORDER FOR ARKANSAS POWER & LIGHT COMPANY TO APPEAR AND SHOW CAUSE WHY CERTAIN AGREEMENTS SHOULD NOT BE HELD TO BE VOID *AB INITIO*

O R D E R

Pursuant to the "Stipulation and Settlement Agreement" filed in Docket No. 84-249-U on September 5, 1985, and the Commission's Order No. 26 entered in said docket on September 9, 1985, the Secretary of the Commission is hereby directed to close the above-styled docket effective as of the date of this order.

BY ORDER OF THE COMMISSION

This 20th day of September, 1985.

/s/ Dr. Robert E. Johnston,
Chairman

/s/ James W. Daniel, Commissioner

/s/ Patricia S. Qualls, Commissioner

/s/ Vertina Burris acting
Melinda Mills
Secretary of the Commission

(Stamp)